Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 89-549

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

DONALD EUGENE STAGGS,
Petitioner,

VS

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Petitioner denies that the indictment provided adequate notice of the "continuing series of violations" as set forth in Count 3. (Res. 4).

Respondent argues that the failure to incorporate Count 1 by reference into Count 3 of the indictment constitutes harmless error. (Res. 5). This contention is without merit. Petitioner used all available means prior to trial in an attempt to obtain notice of the acts that the government intended to prove in support of the allegation of a "continuing series of violations" in Count 3. Petitioner filed both a Motion to Dismiss Count 3, citing sufficiency, vagueness and specificity as the basis for dismissal; and also filed a Motion for Bill of Particulars, with specific reference as to what constituted the "continuing series of violations" in Count 3, to the original indictment. (11/23/87 Docketing Sheet). Petitioner re-urged the same Motions with reference to the superseding indictment. (12/3/87 Docketing Sheet). All Motions were denied by the trial court approximately one month prior to the trial on the merits. (12/8/87 Docketing Sheet).

In the concurring opinion (Pet. B), the Judge failed to note that bills of particulars had in fact been filed and denied; although Petitioner does not concede that any bill of particulars can save a defective indictment Count. However, the Judge aptly characterizes the action of the trial court by stating,

> "... the trial court's discretion would be abused, in my view, if the district court refused to grant a bill (*of particulars*) requiring the government to reveal the violations it intended to prove to establish the 'continuing series' element." (Pet. B-3).

The court of appeals decision in *United States v. Becton*, 751 F.2d 250, 256-257 (8th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985) is distinguishable from the instant case. In *Becton*, the Defendant did not raise an objection to the indictment before or during trial — clearly requiring a plain error analysis. Similarly, in *United States v. Moya-Gomez*, 860 F.2d 706, 752 fn.42 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 3221 (1989), the court of appeals limited their review to plain error based upon the fact that the trial court instructed the jury that it could consider uncharged offenses as predicate acts and the defendant did not object to the instruction. In the instant case, no such instruction was given by the court.

Without reference by incorporation to the other Counts in the indictment, coupled with the trial court's order denying dismissal or bill of particulars, Petitioner could not determine what the "continuing series of violations" were. It is not hypertechnical to require that the defendant receive notice and be adequately apprised of the charges he must meet so that he may adequately prepare a proper defense.

The statement of the Solicitor that "it is agreed that counts may incorporate the allegations in other counts by reference" (Res. 6, last sentence) fails to address the law in the premises, any such incorporation must be express and not implicit. *United States v. Gray*, 790 F.2d 1290, 1298 (6th Cir. 1986), *rev'd on other grounds, sub nom.*, *United States v. McNally*, 483 U.S. 350 (1987), Fed.R. Crim. P. 7(c)(1).

Respectfully Submitted,

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Dated: December 14, 1989